IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

LORIMAR MUSIC A CORP., DUKE OF EARLE, PRIMARY WAVE EARLE, ROBERT LEE MCDILL D/B/A RANGER BOB MUSIC, UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC., BON JOVI PUBLISHING, RICHARD SAMBORA D/B/A AGGRESSIVE MUSIC, VAN HALEN MUSIC, WB MUSIC CORP., SONY/ATV CROSS KEYS PUBLISHING AND HIDEOUT RECORDS AND DISTRIBUTORS, INC. (GEAR PUBLISHING DIVISION),	)	Case No. 09-6067-CV-SJ-FJG
Plaintiffs,	)	
v.	)	
BLACK IRON GRILL COMPANY,	)	
RICHARD MICHAEL DEBUHR, and	)	
KIM DEBUHR	)	
Defendants.	)	

PLAINTIFFS' SUGGESTIONS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

LATHROP & GAGE LLP

Robert O. Lesley, MO 32458
Joan K. Archer, MO 44070
Kate O'Hara Gasper, MO 61198
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108
Phone: (816) 292-2000
Fax: (816) 292-2001
rlesley@lathropgage.com
jarcher@lathropgage.com

ATTORNEYS FOR PLAINTIFFS

TABLE OF CONTENTS

Page

INTRODUCTION 1

PLAINTIFFS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS 2

A. Plaintiffs' Copyright Ownership and ASCAP Membership 2

B. Proof of Defendants' Intentional Conduct. 3

C. ASCAP's Onsite Investigation of the Black Iron Grill and Proof of Unauthorized Performances 7

ARGUMENT 8

I. there is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law. 8

A. Summary Judgment is Appropriate 8

B. Elements of Copyright Infringement 8

1. Proof of Plaintiff's Copyright Ownership 9

2. Defendants' Public Performance of Plaintiffs' Songs 10

3. Defendants Did Not Have Permission to Perform Plaintiffs' Songs and Their Infringement was Willful. 11

C. Defendants Are Jointly Liable for Copyright Infringement for the Infringing Performances 12

D. Defendants Have No Genuine Defenses 13

1. Defendants are Liable for the Infringing Performances at Black Iron Grill 13

2. Instructions to Avoid Playing Songs in the ASCAP Repertory are No Defense to Claims for Copyright Infringement 14

3. Defendants' Claim that the Black Iron Grill Does Not Make Any Profits is Not a Valid Defense to Copyright Infringement. 15

II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF, STATUTORY DAMAGES, AND COSTS, INCLUDING REASONABLE ATTORNEYS' FEES 16

A. Injunctive Relief 16

B. Statutory Damages 17

C. Plaintiffs are Entitled to Reasonable Costs and Attorneys' Fees 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Barnaby Music Corp. v. Catoctin Broadcasting Corp. of New York,
No. CIV-86-868E, 1988 WL 84169, at *2 (W.D.N.Y. Aug. 10, 1988)........................... 15

Bourne Co. v. Speeks,
670 F. Supp. 777 (E.D. Tenn. 1987)... 15, 16

Boz Scaggs Music v. KND Corp.,
491 F. Supp. 908 (D. Conn. 1980)... 12, 17, 18, 22

Broadcast Music Inc. v. Entertainment Complex,
198 F. Supp. 2d 1291 (N.D. Ala. 2002)... 18

Broadcast Music, Inc. v. Behulak,
651 F. Supp. 57 (M.D. Fla. 1986).. 21

Broadcast Music, Inc. v. Columbia Broadcasting Systems,
441 U.S. 1 (1979).. 2, 14

Casey v. Gentry,
No. 87-1108-CV-W-9, 1989 WL 128266, at *5 (W.D. Mo. July 10, 1989) 20

Chi-Boy Music, et al. v. Charlie Club, Inc.,
930 F.2d 1224 (7th Cir. 1991) 14, 22

Coleman v. Payne,
698 F. Supp. 704 (W.D. Mich. 1988) 18

Collins Court Music, Inc. v. Pulley,
704 F. Supp. 963 (W.D. Mo. 1988) 8, 9

Controversy Music v. Down Under Pub Tyler, Inc.,
488 F. Supp. 2d. 572 (E.D. Tex. 2007)... 17

Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.,
887 F. Supp. 219 (E.D. Mo. 1995).. 8, 9

EMI Mills Music, Inc. v. Empress Hotel, Inc.,
470 F. Supp. 2d 67 (D.P.R. 2006).. 18

F. W. Woolworth Co.,
344 U.S. at 233.. 18

Flyte Tyme Tunes v. Miszkiewicz,
715 F. Supp. 919 (E.D. Wis. 1989).. 10

Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994) 20, 21

Fourth Floor Music, Inc. v. Der Place, Inc.,
572 F. Supp. 41 (D. Neb. 1983) 14

Gnossos Music v. DiPompo,
No. 89-0051P, 1989 WL 154358, at *2 (D. Me. Sept. 14, 1989) 15

Halnat Publ'g Co. v. L.A.P.A., Inc.,
669 F. Supp. 933 (D. Minn. 1987) 17

Herbert v. Shanley Co.,
242 U.S. 591 (1917) 16

International Korwin Corp. v. Kowalczyk,
855 F.2d 375 (7th Cir. 1988) 2, 18, 19, 21

Little Mole Music v. Spike Inv., Inc.,
720 F. Supp. 751 (W.D. Mo. 1989) 8, 13, 20

M.L.E. Music Sony/ATV Tunes, LLC. v. Julie Ann's, Inc.,
No. 8:06-cv-1902, 2008 WL 2358979 (M.D. Fla. June 9, 2008) 14

Milene Music, Inc. v. Gotauco,
551 F. Supp. 1288 (D.R.I. 1982) .... passim

Moose Music v. D'Agostino,
No. 1:92:CV:312, 1992 WL 12601925, at *2 (W.D. Mo. Dec. 23, 1992) 20

Morganactive Songs v. K & M Fox, Inc.,
77 USPQ 2d 1065 (S.D. Ind. 2005) 14

Music City Music v. Alfa Foods, Ltd.,
616 F. Supp. 1001 (E.D. Va.1985) 17

Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc.,
656 F. Supp. 826 (M.D. Fla. 1987) 18

Prater Music v. Williams,
No. 87-0362-CV-W-6, 1987 WL 46354, at *4 (W.D. Mo. Nov. 3,1987) 20

RCA/Ariola Int'l, Inc. v. Bel-Aire Pharmacy, Inc.,
845 F.2d 774 (8th Cir. 1988) 12

RCA/Ariola International, Inc. v. Grayston Co.,
845 F.2d 773 (8th Cir. 1988) 13

Rilting Music, Inc., v. Speakeasy Enterprises., Inc.,
706 F. Supp. 550 (S.D. Ohio 1988) 8, 10

Rodgers v. Eighty Four Lumber Co.,
623 F. Supp. 889 (W.D. Pa. 1985).. 18

S. Nights Music Co. v. Moses,
669 F. Supp. 305 (C.D. Cal. 1987) 17

Shapiro, Bernstein & Co. v. Veltin,
47 F. Supp. 648 (W.D. La. 1942)... 15

Simpleville Music, et al. v. H. Jack Mizell,
451 F. Supp. 2d 1293 (M.D. Ala. 2006) 10

Van Halen Music v. Palmer,
626 F. Supp. 1163 (W.D. Ark. 1986).. 8, 9, 14

Warner Bros., Inc. v. Lobster Pot, Inc.,
582 F. Supp. 487 (N.D. Ohio 1984).. 8, 10

Warner Bros., Inc. v. O'Keefe,
468 F. Supp. 16 (S.D. Iowa 1977) 15

Other Authorities

17 U.S.C. § 502(a) 16

17 U.S.C. § 504(c)(1).. 17

17 U.S.C. §§ 502, 504, and 505 (2009) 1, 16, 19

17 U.S.C. §410(c) 9

Rules

Fed. R. Civ. P. 8(c) 9

INTRODUCTION

Plaintiffs Lorimar Music A Corp., *et al*. (collectively "Plaintiffs") submit these suggestions in support of their motion for summary judgment and attorneys' fees adjudging defendants Black Iron Grill Company, Richard Michael DeBuhr, and Kim DeBuhr (collectively "Defendants") liable for copyright infringement, on the grounds that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law.

This is an action against Defendants for infringement by unauthorized public performance of Plaintiffs' copyrighted musical compositions, "GUITAR TOWN," "COPPERHEAD ROAD," "LOUISIANA SATURDAY NIGHT," "BABY'S GOT HER BLUE JEANS ON," "WANTED DEAD OR ALIVE," "DANCE THE NIGHT AWAY," "REDNECK WOMAN" and "TURN THE PAGE" on the night of March 19-20, 2009 at Defendants' establishment known as Black Iron Grill Steakhouse and Saloon (hereinafter "Black Iron Grill"), located at 1300 U.S. Highway 136 W. Rock Port, Missouri. Schedule A to the Amended Complaint sets forth the copyright owners, titles, writers, and pertinent copyright information for each of the eight (8) songs in the suit. (See Exhibit A, Plaintiffs' Amended Complaint, Dkt. #25).

Plaintiffs own the copyrights in these musical compositions and seek remedies provided by the U.S. Copyright Law (17 U.S.C. §§ 502, 504, and 505 (2009)): (1) an injunction prohibiting further infringing performances of any copyrighted musical compositions in the ASCAP repertory; (2) statutory damages in the amount of not less than $750 or more than $30,000 in each cause of action; and (3) costs, including reasonable attorneys' fees.

Plaintiffs are members of the American Society of Composers, Authors and Publishers ("ASCAP"), to which they have granted a non-exclusive right to license non-dramatic public performances of their copyrighted musical compositions. On behalf of Plaintiffs and its more than 380,000 members, ASCAP licenses thousands of music users, including radio and television networks, commercial radio and television stations, restaurants, nightclubs, and other establishments, whose owners desire to lawfully perform the copyrighted musical compositions in the ASCAP repertory. [1]

Black Iron Grill has never been licensed to perform works in the ASCAP repertory, despite ASCAP's repeated offers of a license. Nor have Defendants sought permission from ASCAP's members to perform copyrighted musical compositions in the ASCAP repertory, including the eight songs owned by Plaintiffs and performed at Black Iron Grill on the night of March 19-20, 2009. Rather, Defendants have deliberately chosen to perform music in the ASCAP repertory continuously and without any authorization, necessitating the filing of this action to obtain the relief mandated by the Copyright Law.

PLAINTIFFS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS

A. Plaintiffs' Copyright Ownership and ASCAP Membership

1. Each of the Plaintiffs hold valid copyrights to the corresponding songs identified in Schedule A to the Amended Complaint. *See* **Exhibit 1**, Affidavit of Mary A. Jenkins, ¶¶ 3-4; Exs. A - H. [2]

2. Plaintiffs demonstrate their ownership by providing verified evidence in the form of copyright registration certificates, assignments, and other documents which indicate copyright ownership of the songs. *Id.*

3. Defendants admitted they had no knowledge of any facts or information, indicating that the Plaintiffs are not the owners of valid copyrights for these songs. *See* **Exhibit**

---

[1] For a more detailed description of how ASCAP functions, see *Broadcast Music, Inc. v. Columbia Broadcasting Systems*, 441 U.S. 1 (1979) and *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375 (7th Cir. 1988).

[2] Ms. Jenkins is the ASCAP employee in charge of maintaining pertinent copyright records generally, and specifically, copyright registration certificates, assignments, and other documents which demonstrate copyright ownership of songs involved in actions such as the case at bar. Attached to Ms. Jenkins' Affidavit are copies of the copyright registration certificates and other relevant documents for the eight songs in suit.

2, Defendant Black Iron Grill Company's Answers to Plaintiffs' First Request for Admissions, ¶ 2 ("Representatives of the Black Iron Grill Company have no knowledge of any facts demonstrating, or information, indicating that plaintiffs are not the owners of valid copying for the *songs in suit*. RESPONSE: Admit, at this time pending further discovery.")

4. ASCAP is an unincorporated membership association whose more than 380,000 members write and publish musical compositions. See **Exhibit 3**, Affidavit of Douglas Jones ("Jones Aff."), ¶ 3. [3]

5. Each ASCAP member, including each plaintiff in this action, granted ASCAP a non-exclusive license to authorize public performances of the member's copyrighted songs. *Id.*

6. On behalf of all its members, ASCAP licenses the right to perform publicly all of the hundreds of thousands of copyrighted songs in the ASCAP repertory. *Id.* ASCAP's licensees include television networks and stations, radio networks and stations, restaurants, nightclubs, hotels, and many other kinds of music users. *Id.*

B. Proof of Defendants' Intentional Conduct.

7. Richard and Kim DeBuhr, as directors and officers of the Black Iron Grill Company, opened the Black Iron Grill Steakhouse and Saloon in December 2007. *See* **Exhibit 4**, Selected Excerpts from the February 16, 2010 Deposition of Richard DeBuhr, ("R. DeBuhr Depo.") p. 16:19-22.

8. The Black Iron Grill establishment is owned by the Black Iron Grill Company, which is solely owned by Richard and Kim DeBuhr. *See* **Exhibit 5**, Black Iron Grill Company's Answers Plaintiffs' First Set of Interrogatories, ¶ 3 ("Black Iron Grill Co. is an S-

[3] Mr. Douglas Jones is ASCAP's Manager of Litigation Services. Mr. Jones' testimony recounts the history of ASCAP's dealings with Defendants and ASCAP's efforts to resolve its members' infringement claims without litigation. Attached to Mr. Jones' Affidavit is evidence of ASCAP's repeated efforts to license the Black Iron Grill's musical performances.

Corp. The shareholders are Richard DeBuhr and Kim DeBuhr who each own one-half of the shares of the corporation and have so since its inception in 2006. Richard DeBuhr is the president of the corporation. Kim DeBuhr is the secretary of the corporation. There are no other owners, operators, controllers, or managers."); *see also* **Exhibit 6**, Selected Excerpts from the February 16, 2010 Deposition of Kim DeBuhr, pp. 13:3 – 15:5 (Kim DeBuhr is a shareholder, secretary, and vice president of the corporation. She is at the Black Iron Grill approximately five days a week and has the ability to tell employees what to do.) *and* Ex. 4, R. DeBuhr Depo., pp. 18:6 – 19:2.

9. They have been responsible for managing Black Iron Grill Company and they make the decisions as to the various policies of the Black Iron Grill, including the decision to have music. Ex. 4. R. DeBuhr Depo., pp. 20:18 – 22:1; 43:18 – 44:2.

10. There has never been any manager or anyone else, other then Richard DeBuhr and Kim DeBuhr, who had the authority to make decisions regarding the operation of the Black Iron Grill. *Id.*

11. Black Iron Grill is located at 1300 U.S. Highway 136 W. Rock Port, Missouri. *Id.* at p. 20:7-8. The establishment offers food, liquor, dancing, and music provided by disc jockeys, jukeboxes, live performers, and Karaoke providers. *Id.,* pp. 22:9-13, 37:16-23, 41:20 – 42:25.

12. ASCAP routinely contacts those who own and operate establishments that perform ASCAP members' copyrighted music to advise them of their obligations under the copyright law and to offer them ASCAP licenses. Ex. 3, Jones Aff., ¶ 4.

13. On or about July 24, 2008, ASCAP sent at letter to defendant Richard DeBuhr. *Id.*, ¶ 7; *see also* Composite Exhibit A to Jones Aff. The letter explained ASCAP's role in licensing music users for their public performances of its members' copyright musical works.

Id. Additionally, the letter offered the Black Iron Grill the opportunity to purchase a license and enclosed the appropriate forms. *Id.*

14. On or about August 5, 2008, an ASCAP representative called Mr. DeBuhr to follow up on its earlier offer to license the Black Iron Grill. *Id.* Mr. DeBuhr stated that he had received the July 24, 2008 letter, that he did not intend to purchase a license, and hung up the telephone. *Id.*

15. The following day, August 6, 2008, ASCAP sent a second letter to Mr. DeBuhr. *Id.* *Id.* This letter addressed Mr. DeBuhr's refusal to obtain a license and informed him of the serious consequences of unauthorized performances of copyrighted musical works. *Id.*

16. ASCAP informed Mr. DeBuhr:

> Under the United States Copyright Law, unauthorized performances of copyrighted musical works constitute copyright infringement for which the copyright owners may bring suit in federal court. In such an action, the court can aware damages ranging from $750 to $30,000 for each song or musical work infringes, and as much as $150,000 per infringement if the infringer's conduct is willful. In addition, the court may also require an infringer to pay our members' legal expenses incurred in such a lawsuit.

Id. (emphasis in original).

14. ASCAP's August 6, 2008 communication again provided the appropriate forms for obtaining a license, as well as more information regarding ASCAP's function in the music industry. *Id.*

15. On or about August 11, 2008, Mr. DeBuhr telephoned an ASCAP licensing representative. Ex. 3, Jones Aff. ¶ 8. ASCAP's file indicates that Mr. DeBuhr asked the representative to have ASCAP "stop harassing him," then Mr. DeBuhr asked "how long it has been since [the representative] had a good ass whipping?" Mr. DeBuhr went on to inform the

ASCAP representative that Mr. DeBuhr could "find him." *Id.* Mr. DeBuhr admitted to the "ass whipping" threat in his deposition, as well as in response to ASCAP's Requests for Admission. *See* Ex. 2, Defendant Black Iron Grill Company's Answers to Plaintiffs' First Request for Admissions, ¶ 9 ("On or around August 11, 2008, defendant DeBuhr asked an ASCAP representative when was the last time the representative had an "ass whipping." RESPONSE: Admit"); Ex. 4, R. DeBuhr Depo. p., 51:17-25 ("**Q.** Do you recall saying to an ASCAP representative that you wanted to know where he was located and you wanted to know how long it had been since he had a good ass whooping? Whipping rather. **A.** Yes, I recall that one. Is that the David so and so on August whenever? **Q.** Yes. **A.** Okay.").

16. Even after Mr. DeBuhr's threats, ASCAP still attempted to license the Black Iron Brill to authorize the performances of works in the ASCAP repertory. Ex. 3, Jones Aff., ¶ 9.

17. On or about August 18, 2008, an ASCAP representative left a detailed message for Mr. DeBuhr regarding the necessity and benefits of an ASCAP licensing agreement. *See* Composite Exhibit A to Jones Aff.

18. On or about August 19, 2008, ASCAP sent Mr. DeBuhr a final letter, stating:

> ASCAP's file for Black Iron Grill shows that we have repeatedly advised you, by letters and visits, or your liability under the United States Copyright Law for infringing performances of our members' copyrighted musical compositions. . . . Despite our efforts, you remain unlicensed and you have persisted in willfully infringing on our members' copyrights . . . . Before referring this matter to our attorneys, we are offering you the opportunity to avoid the expense of litigation by securing an ASCAP license.

Id. Again, ASCAP enclosed with its letter the appropriate forms for licensing. *Id.*

19. Despite all these contacts from ASCAP, Defendants neither obtained an ASCAP license nor authorization directly from the owners of the copyrighted musical works being performed at Black Iron Grill. Ex. 3, Jones Aff., ¶ 9; Ex. 4, R. DeBuhr Depo., p. 47:18-23 ("**Q.**

And I take it that you've never contacted any of the owners of the copyrights in those musical compositions and asked them for permission to play their music? **A.** I don't have any recollection of that either.").

20. Had Defendants been properly licensed by ASCAP to date, Defendants would owe approximately $10,241.00 in license fees. Ex. 3, Jones Aff., ¶ 12.

C. ASCAP's Onsite Investigation of the Black Iron Grill and Proof of Unauthorized Performances

21. In view of Defendants actions, ASCAP arranged for an independent investigator to visit the Defendants' establishment to determine if the Black Iron Grill was publicly performing ASCAP members' music. Ex. 3, Jones Aff., ¶ 10.

22. On the night of March 19-20, 2009, investigator Dennis Sichner visited the Black Iron Grill. **Exhibit 7**, Declaration of Dennis Sichner, ¶ 4. He noted that music was performed by means of a disc jockey using Karaoke equipment. *Id.* at ¶ 6.

23. Over the course of several hours, he made a contemporaneous list of the titles of all musical compositions performed during his visit that he was able to recognize. *Id.*

24. The songs Mr. Sichner heard performed at Black Iron Grill include "GUITAR TOWN," "COPPERHEAD ROAD," "LOUISIANA SATURDAY NIGHT," "BABY'S GOT HER BLUE JEANS ON," "WANTED DEAD OR ALIVE,“ "DANCE THE NIGHT AWAY," "REDNECK WOMAN" and "TURN THE PAGE." *Id*

25. Following his visit to the Black Iron Grill, Mr. Sichner prepared and submitted to ASCAP a detailed report. *Id.*; *see also* Ex. B to Jones Aff. (a true and correct copy of Mr. Sichner's report).

26. Defendants admit they do not have personal knowledge of the songs that were performed at the Black Iron Grill that night and have no record of what songs were performed that night. Ex. 4, R. DeBuhr Dep., p. 40:10-18.

ARGUMENT

I. THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. Summary Judgment is Appropriate

Summary judgment is now routinely granted to copyright owners based upon claims of copyright infringement, where, as here, there is no genuine issue of fact to be tried. Several decisions granting summary judgments in virtually identical cases include *Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751 (W.D. Mo. 1989), *Collins Court Music, Inc. v. Pulley*, 704 F. Supp. 963 (W.D. Mo. 1988); *Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.*, 887 F. Supp. 219 (E.D. Mo. 1995); *Rilting Music, Inc., v. Speakeasy Enterprises, Inc.*, 706 F. Supp. 550, 551 (S.D. Ohio 1988); *Van Halen Music v. Palmer,* 626 F. Supp. 1163, 1164 (W.D. Ark. 1986); *Warner Bros., Inc. v. Lobster Pot, Inc.*, 582 F. Supp. 487, 481 (N.D. Ohio 1984); and *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288 (D.R.I. 1982). In all of these cases, the district court granted summary judgment in favor of ASCAP's members on their copyright claims. In the instant action, the evidence likewise supports a finding of summary judgment on behalf of Plaintiffs.

B. Elements of Copyright Infringement

The elements of copyright infringement by unauthorized public performance are set forth in *Collins Court Music, Inc. v. Pulley*, 704 F. Supp. 963, 964 (W.D. Mo. 1988). In order to establish a prima facie case for infringement of copyright in musical compositions, a plaintiff must prove the following five elements:

(1) the originality and authorship of the compositions involved;
(2) compliance with all formalities required to secure a copyright under Title 17, United States Code;
(3) that plaintiffs are the proprietors of the copyrights of the compositions involved in this action;
(4) that the compositions were performed publicly for profit [by the defendants]; and
(5) that the defendants had not received permission from any of the plaintiffs or their representatives for such performance.

Id. (citing *Van Halen Music*, 626 F. Supp. at 1165).[4] As shown below, Plaintiffs satisfy each element and are entitled to judgment as a matter of law.

1. Proof of Plaintiff's Copyright Ownership

Plaintiffs own valid copyrights in the songs in suit. To establish this fact, Plaintiffs submit with their motion true and correct copies of the copyright registration certificates, assignments, and other relevant documents. Statement of Uncontroverted Material Facts, ("SOF") ¶¶ 1-2. Ms. Jenkins is the ASCAP employee in charge of maintaining pertinent copyright records generally, and specifically, copyright registration certificates, assignments, and other documents which demonstrate copyright ownership of songs involved in actions such as the case at bar. SOF ¶ 1, fn 2. Attached to Ms. Jenkins' Affidavit are copies of the copyright registration certificates and other relevant documents pertaining to the eight (8) songs at issue in the suit. *Id.*

Copyright registration certificates constitute prima facie evidence of the facts stated therein, 17 U.S.C. §410(c), and establish proof of compliance with the first three elements of *Collins Court Music*, including, of course, Plaintiffs' ownership of valid copyrights in the musical compositions in the suit. *See Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.*, 887 F. Supp. 219, 222 (E.D. Mo. 1995) (certified copies of copyright certificate for each of

[4] Although this case and others treat a defendant's failure to obtain permission as an element of plaintiffs' proof, this element is in the nature of an affirmative defense – it is for the defendant to plead and affirmatively prove that he was authorized to perform plaintiffs' songs. *See* Fed. R. Civ. P. 8(c).

musical compositions at issue established validity of copyrights in the composition); *see also Simpleville Music, et al. v. H. Jack Mizell*, 451 F. Supp. 2d 1293, 1296 (M.D. Ala. 2006); *Lobster Pot, Inc.*, 582 F. Supp. at 481; *Flyte Tyme Tunes v. Miszkiewicz*, 715 F. Supp. 919, 921 (E.D. Wis. 1989). Indeed, the evidence of copyright ownership is uncontroverted; Defendants have admitted that they have no knowledge, facts, or information to dispute Plaintiffs' ownership rights. SOF ¶ 3.

Plaintiffs have thus conclusively established the first three elements of their case: originality of the compositions, compliance with Title 17 of U.S. Code, and ownership of valid copyrights in the songs in suit. Defendants have not offered, and cannot offer, contrary evidence on these elements.

2. Defendants' Public Performance of Plaintiffs' Songs

The uncontroverted declaration of independent investigator Dennis Sichner provides evidence proving the fourth element of copyright infringement: that the eight copyrighted songs in suit were publicly performed at Black Iron Grill on the night of March 19-20, 2009. Mr. Sichner testified that he heard "GUITAR TOWN," "COPPERHEAD ROAD," "LOUISIANA SATURDAY NIGHT," "BABY'S GOT HER BLUE JEANS ON," "WANTED DEAD OR ALIVE," "DANCE THE NIGHT AWAY," "REDNECK WOMAN" and "TURN THE PAGE," the rights to all of which are owned by the respective Plaintiffs, performed at Black Iron Grill on this night. SOF ¶¶ 1-2; 21-23. This testimony is prima facie evidence of Defendants' public performance of these copyrighted songs. *See, e.g., Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288 (D.R.I. 1982); *Lobster Pot, Inc.*, 582 F. Supp. at 481; *Rilting Music, Inc. v. Speakeasy Enters., Inc.*, 706 F. Supp. 550 (S.D. Ohio 1988). Defendants admit they do not have personal knowledge of what songs were performed at the Black Iron Grill on March 19-20 and have no record of what songs were performed that night. SOF ¶ 26. Thus the evidence of public performance of the songs at issue is uncontroverted.

3. Defendants Did Not Have Permission to Perform Plaintiffs' Songs and Their Infringement was Willful.

It is uncontroverted that Defendants were not authorized, nor did they have permission, to perform the musical compositions in question on the date at issue. SOF ¶ 24. Plaintiffs, therefore, satisfy the fifth element necessary to prove copyright infringement. This is the final uncontroverted element and Plaintiffs are entitled to judgment as a matter of law.

ASCAP contacted Defendants on multiple occasions and repeatedly informed Defendants that if they chose to publically perform music from the ASCAP repertory, they had an obligation to obtain an ASCAP license or permission directly from the copyright owners. SOF ¶¶ 13-19. At each and every instance, Defendants willfully refused to seek licensure and continued to illegally perform the music. *Id.* In no uncertain terms, ASCAP warned Defendants:

> Under the United States Copyright Law, unauthorized performances of copyrighted musical works constitute copyright infringement for which the copyright owners may bring suit in federal court. In such an action, the court can aware damages ranging from $750 to $30,000 for each song or musical work infringes, and as much as $150,000 per infringement if the infringer's conduct is willful. In addition, the court may also require an infringer to pay our members' legal expenses incurred in such a lawsuit.

SOF ¶ 16. Nonetheless, Defendants continuously refused to obtain a license. Rather then obey the Copyright Law, Defendant Richard DeBuhr physically threatened an ASCAP representative with an "ass whipping." SOF ¶ 15. Mr. DeBuhr admitted to the "ass whipping" threat in his deposition, as well as in response to ASCAP's Requests for Admission. *Id.* Despite the threat, ASCAP still contacted Defendants one last time in an attempt to avoid litigation. SOF ¶¶ 16-18. Defendants again refused to obtain a license. SOF ¶ 19. There is no doubt that

Defendants did not have permission to publicly perform music from the ASCAP repertory. *Id.* This material fact is undisputed.

C. Defendants Are Jointly Liable for Copyright Infringement for the Infringing Performances

It is well settled that copyright infringement is a tort, and all who participate in the tortious activity are liable as joint and several tortfeasors. *See, e.g., Boz Scaggs Music v. KND Corp*., 491 F. Supp. 908 (D. Conn. 1980). Defendants admitted that the Black Iron Grill Company owns the Black Iron Grill establishment. SOF ¶ 8. Therefore, the defendant corporation is clearly liable for the infringement. *Cross Keys*, 887 F. Supp. at 223. The test of liability for an individual is whether the individual has the right and ability to supervise the infringing activity and a direct financial interest in such activity. *Id.*; *see also RCA/Ariola Int'l, Inc. v. Bel-Aire Pharmacy, Inc*., 845 F.2d 774, 781 (8th Cir. 1988). Under this standard, the individual Defendants are also liable for the infringing performances at Black Iron Grill.

Defendants Richard DeBuhr and Kim DeBuhr are liable for the infringement. Numerous facts regarding Richard DeBuhr and Kim DeBuhr, and their joint and several liability for the infringement, are uncontroverted. At all times mentioned in the Complaint, they were and still are the officers and directors of Black Iron Grill Company with joint responsibility for the control, management, operation and maintenance of the affairs of the company. SOF ¶¶ 8-10. Mr. and Mrs. DeBuhr are owners and the sole shareholders of the company. *Id.* As a matter of corporate law, if the company reaped any profits, they would be entitled to receive and share in those profits. They are in charge of all duties pertaining to the operation of the establishment. SOF ¶¶ 8-10. There has never been any manager or anyone else, other then Richard DeBuhr and Kim DeBuhr, who had the authority to make decisions regarding the operation of the Black Iron Grill. SOF ¶ 10.

Because Richard DeBuhr and Kim DeBuhr had both the right and ability to supervise the infringing performance of Plaintiffs' musical compositions at Black Iron Grill and a direct financial interest in this activity, pursuant to applicable law they are both individually liable, along with their company, for copyright infringement occurring at Black Iron Grill. *Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 755 (W.D. Mo. 1989) ("Vicarious liability is predicated on the right and ability of the defendant to supervise the infringing activity and the defendant's obvious and direct financial interest in such an activity." (citing *RCA/Ariola International, Inc. v. Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988)).

D. Defendants Have No Genuine Defenses

Defendants have not offered a single, genuine defense to Plaintiffs' claims, whether in the Answer or through other pleadings, instead choosing to summarily deny Plaintiffs' allegations without offering any evidence to controvert those allegations. In sum, it is evident that Defendants offer no genuine defense because they have no defense.

While Defendants have not set forth any affirmative defenses, they do hint at several excuses for their infringing behavior. Nevertheless, none of Defendants' assertions, even if true, provide a defense to claims for copyright infringement. Nor do Defendants' assertions provide any to reason to deny Plaintiffs the full relief they seek.

1. Defendants are Liable for the Infringing Performances at Black Iron Grill

On the night of March 19-20, 2009, the ASCAP-retained private investigator patronized the Black Iron Grill. SOF ¶¶ 19-20. On this particular night, music was publically performed by means of a Karaoke disc jockey who was not an employee of the Black Iron Grill. SOF ¶ 20.

This fact has no bearing on Defendants' liability for the infringing performances.[5] It is well established that the owner and operator of an establishment is liable for infringing activities that occur at the establishment. *Van Halen Music v. Palmer*, 626 F. Supp. 1528 (D. Ark. 1985), *and Milene Music*, 551 F. Supp. at 1288. The owner of the establishment cannot escape liability for copyright infringement by claiming that the performers are independent contractors. *Fourth Floor Music, Inc. v. Der Place, Inc*., 572 F. Supp. 41, 43 (D. Neb. 1983) ("[T]he fact that the compositions were performed by independent contractors is of no import, since the owner of the establishment has promoted the infringing acts, even if he/it has no knowledge that a copyright is being infringed."); *see also Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Association*, 423 F. Supp. 341 (D. Mass. 1976). Nor can an owner escape liability by "hiding his head in the sand like an ostrich" and ignoring advice from ASCAP that he is an infringer. *Chi-Boy Music, et al. v. Charlie Club, Inc*., 930 F.2d 1224 (7th Cir. 1991).

2. Instructions to Avoid Playing Songs in the ASCAP Repertory are No Defense to Claims for Copyright Infringement

Defendants' purported efforts to assure that no music in the ASCAP repertory was performed at the Black Iron Grill is not a defense to copyright infringement. "Specific instructions to the performers not to play ASCAP songs will not relieve a defendant of liability if in fact the songs were performed." *Warner Bros., Inc. v. O'Keefe*, 468 F. Supp. 16, 20 (S.D.

---

[5] Two recent cases holding the owner of an establishment liable for the infringing performances by means of Karaoke are *Morganactive Songs v. K & M Fox, Inc*., 77 USPQ 2d 1065 (S.D. Ind. 2005) (Pursuant to Local Rules, this opinion is attached as **Exhibit 8**) *and M.L.E. Music Sony/ATV Tunes, LLC. v. Julie Ann's, Inc*., No. 8:06-cv-1902, 2008 WL 2358979 (M.D. Fla. June 9, 2008) (holding that the burden is on the defendant to prove an allegation that Karaoke operator had a license.) In addition, there are many other cases that stand for the generally similar proposition that establishment owners are liable for the infringing performances of independent disc jockeys. *See, e.g., Van Halen Music v. Palmer*, 626 F. Supp. 1163 (W.D. Ark. 1986); *Broadcast Music, Inc. v. Durflinger*, No. 77-243-2, 1980 WL 1140, at *3 (S.D. Iowa 1980) ("[I]t is immaterial that the musicians may have been independent contractors over whom the proprietor has no control.").

Iowa 1977). Further, the owner of an establishment who hires a performer who gives an unlicensed performance of a musical composition is liable as an infringer even if the performer acted in specific derogation of directions by the owner not to play copyrighted compositions. *Id.* (citing *Shapiro, Bernstein & Co. v. Veltin*, 47 F. Supp. 648 (W.D. La. 1942)). Therefore, even assuming the truth of Defendants' allegation, the allegation does not present a defense.

To the contrary, such efforts have routinely been held to support summary judgments based on a finding of willfulness because such instructions prove defendants were aware of their obligations under the Copyright Law. S*ee e.g., Barnaby Music Corp. v. Catoctin Broadcasting Corp. of New York*, No. CIV-86-868E, 1988 WL 84169, at *2 (W.D.N.Y. Aug. 10, 1988). Defendants are liable even if performances are contrary to their specific instructions not to play ASCAP music. *Id.*; *see also Shapiro, Bernstein & Co. v. Veltin*, 47 F. Supp. 648 (W.D. La. 1942). Moreover, defendants are liable even absent actual knowledge that they are infringing copyrights. *Id.*

3. Defendants' Claim that the Black Iron Grill Does Not Make Any Profits is Not a Valid Defense to Copyright Infringement.

Defendants imply that they should not be liable for copyright infringement because Black Iron Grill Company loses money. The law, however, does not allow an infringer who is unsuccessful in business to obtain a free pass to violate Copyright Law. The law protects copyrights against infringement from successful and unsuccessful business people alike. "[I]t is well established that a profit-making enterprise which publicly performs copyrighted musical compositions is deemed to do so for profit." *Gnossos Music v. DiPompo*, No. 89-0051P, 1989 WL 154358, at *2 (D. Me. Sept. 14, 1989).

The Black Iron Grill is a profit-making enterprise even if it never makes a profit. *Bourne Co. v. Speeks*, 670 F. Supp. 777, 779 (E.D. Tenn. 1987). This is because the Black Iron Grill is clearly operated in the hope of realizing a profit. *See Id.* As Justice Oliver Wendall Holmes observed in deciding that the performance of musical compositions in a restaurant for the incidental entertainment of the diners constituted a copyright infringement, "[w]hether it pays or not the purpose of employing it is profit and that is enough." *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917). More importantly, the Defendants have an obvious and undeniable financial interest in the Black Iron Grill. SOF ¶ 8. If the establishment did make any money, as co-owners of the company that owns the establishment, defendants Richard and Kim DeBuhr would be entitled to receive the profits. Financial interest in the infringing activity, as opposed to actual profit from the activity, is sufficient. *See Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.*, 887 F. Supp. 219, 222-23 (E.D. Mo. 1995) ("direct financial interest in the exploitation of the copyrighted materials" is a prerequisite for vicarious liability).

II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF, STATUTORY DAMAGES, AND COSTS, INCLUDING REASONABLE ATTORNEYS' FEES

U.S. Copyright Law (17 U.S.C. §§ 502, 504, and 505 (2009)) provides the following remedies for copyright infringement: (1) an injunction prohibiting further performances; (2) statutory damages in the amount of not less than $750 or more than $30,000 in each cause of action; and (3) costs, including reasonable attorneys' fees. All of these remedies are appropriate here.

A. Injunctive Relief

17 U.S.C. § 502(a) provides:

> Any court having jurisdiction of a civil action arising under this title may...grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

A permanent injunction prohibiting further infringing performances is appropriate and is routinely entered in cases involving infringements of copyrights in musical compositions when infringement by unauthorized public performance has been proven. *See, e.g., Halnat Publ'g Co. v. L.A.P.A., Inc.*, 669 F. Supp. 933, 938 (D. Minn. 1987); *Milene Music, Inc.*, 551 F. Supp. at 1295; *Boz Scaggs Music*, 491 F. Supp. at 914.

Recognizing that Plaintiffs in this type of action represent all of ASCAP's members, courts have enjoined Defendants from performing any or all music in the ASCAP repertory. *See, e.g., Controversy Music v. Down Under Pub Tyler, Inc.*, 488 F. Supp. 2d. 572 (E.D. Tex. 2007); *S. Nights Music Co. v. Moses*, 669 F. Supp. 305, 306 (C.D. Cal. 1987). These Defendants should be similarly enjoined.

B. Statutory Damages

17 U.S.C. § 504(c)(1), provides in pertinent part:

> [T]he copyright owner may elect . . . to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than $750 or more than $30,000 as the court considers just.

The determination of the amount of damages within the statutory range is left entirely to the court's discretion. District courts are "accorded wide and almost exclusive discretion in determining the size of the statutory damage award." *Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.*, 887 F. Supp. 219, 224 (E.D. Mo. 1995) (quotation omitted). Among the factors to be considered in awarding statutory damages are: (1) the expenses saved and profits reaped by defendants in connection with the infringement; (2) revenues lost by plaintiffs; and (3) whether the infringement was willful and knowing or accidental and innocent. *Id.* Here, had Defendants been properly licensed by ASCAP to date, Defendants would owe approximately $10,241.00 in license fees. SOF ¶ 20. However, courts have generally agreed that statutory damages should exceed unpaid licensing fees to drive home the point that "it costs less to obey the copyright laws than to violate them." *Id.* (quoting *Music City Music v. Alfa Foods, Ltd.*, 616 F. Supp. 1001, 1003 (E.D. Va.1985).

Accordingly, courts typically award substantially more than the minimum statutory damages and more than the infringer would have paid in license fees. *See, e.g., Int'l Korwin Corp.*, 665 F. Supp. at 658-59 ($1,500 for each of 7 infringements; approximately three times the amount of a properly purchased license); *EMI Mills Music, Inc. v. Empress Hotel, Inc.*, 470 F. Supp. 2d 67, 76 (D.P.R. 2006) ($15,000 per count for each of four infringements; license fees were approximately $18,000); *Broadcast Music Inc. v. Entertainment Complex*, 198 F. Supp. 2d 1291 (N.D. Ala. 2002) (total damage award of $43,000; license fees would have totaled approximately $14,400); *Coleman v. Payne*, 698 F. Supp. 704, 708 (W.D. Mich. 1988) (more than nine times license fees owed); *Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc.*, 656 F. Supp. 826, 829 (M.D. Fla. 1987) ($2,500 for each of 20 infringements; license fees would have totaled approximately $22,000); *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 889, 892 (W.D. Pa. 1985) ($2,500 for each of 49 infringements; license fees would have totaled approximately $77,800); *Boz Scaggs Music*, 491 F. Supp. at 915 ($1,000 for each of 23 infringements; license fees would have totaled approximately $16,000).

Finally, the Supreme Court has also recognized that the award of substantial statutory damages serves the deterrent purpose of the statute:

> [A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience . . . also is designed to discourage wrongful conduct.

F. W. Woolworth Co., 344 U.S. at 233.

Even though it is not required to award the statutory damages amount requested by Plaintiffs, the evidence demonstrates that the defendants have persisted in knowingly and deliberately infringing Plaintiffs' and other ASCAP members' copyrights. ASCAP representatives have repeatedly contacted Defendants, personally, by mail, and by telephone, to inform them of their need to obtain a license in order to legally perform its members' copyrighted music. SOF ¶¶ 12-19. Defendants ignored these repeated offers of a license for their establishment. *Id.* To exacerbate matters, defendant Richard DeBuhr went so far as to physically threaten an ASCAP representative with an "ass whipping." SOF ¶ 15. Instead of complying with the Copyright Law, Defendants continued, and still continue, to "sneer in the face of copyright owners and copyright laws" by performing compositions without a license. *Int'l Korwin Corp*., 665 F. Supp. at 659. These aggravating circumstances certainly demonstrate knowing and willful infringement of Copyright Law. Only statutory damages well in excess of unpaid ASCAP license fees will provide an effective sanction.

To date, Defendants remain unlicensed to perform copyrighted musical compositions in the ASCAP repertory. Mere payment of damages equivalent to ASCAP license fees plus expenses will not deter these Defendants from the continued infringement of copyrighted music. Therefore, Plaintiffs urge this court to award damages of $4,000 per infringement for a total of $32,000 an amount approximately three times the license fees that would have been owed had Defendants been licensed by ASCAP through the end of this year, plus the costs of obtaining the evidence of infringements. This is an appropriate amount to deter Defendants from continuing their infringing conduct. To award less would result in the Defendants benefiting from their deliberate defiance of the Copyright Law.

C. Plaintiffs are Entitled to Reasonable Costs and Attorneys' Fees

17 U.S.C. § 505 provides:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

Although the award of attorneys' fees under this provision is discretionary, the Supreme Court has recognized that awarding attorneys' fees in copyright actions serves the important purpose of allowing copyright holders to vindicate their rights where it would otherwise be impractical to do so. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 529 (1994). Awards of attorneys' fees "are in keeping with the policy behind the Copyright Act's fee shifting provision, for often the actual value of the recovery in copyright infringement actions may not be commensurate with the attorneys fees incurred to obtain the recovery." *Little Mole Music v. Spike Inv. Inc.*, 720 F. Supp. 751, 757 (W.D. Mo. 1989). "Without the fee shifting provision, copyright owners would doubtless be exceedingly reluctant to enforce their rights in such cases." *Id.*

Notably, attorney's fees are routinely granted in the Western District of Missouri. *See Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.*, 887 F. Supp. 219, 224 (E.D. Mo. 1995) ("In view of the evidence presented and the evident willfulness of defendants' actions, the Court concludes an award of costs and fees is particularly appropriate in this case."); *Moose Music v. D'Agostino*, No. 1:92:CV:312, 1992 WL 12601925, at *2 (W.D. Mo. Dec. 23, 1992) (awarding requested attorneys' fees); *Casey v. Gentry*, No. 87-1108-CV-W-9, 1989 WL 128266, at *5 (W.D. Mo. July 10, 1989) ("Although attorneys fees are awarded in the trial court's discretion, they are the rule rather than the exception and should be awarded routinely."); *Prater Music v. Williams*, No. 87-0362-CV-W-6, 1987 WL 46354, at *4 (W.D. Mo. Nov. 3,1987) ("[T]here is precedent in the Western District of Missouri for a full award [of attorneys' fees]").

The factors that a court may consider in deciding whether to award attorneys' fees include "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty*, 510 U.S. at 535 (quotation omitted). In this action, these factors favor an award of fees. Defendants' liability is unquestionable on both the law and the facts. Defendants were put on notice of the law's requirements by ASCAP's repeated attempts to license Black Iron Grill, yet they made no attempt to obtain proper authorization for their performances of copyrighted music. SOF ¶¶ 13-19. Instead, Defendants chose to continue their infringing activity by performing ASCAP's members' music at their establishment without permission.

Courts routinely award costs, including reasonable attorneys' fees, to the prevailing plaintiffs in uncomplicated copyright infringement actions. Numerous courts have awarded substantial attorneys' fees in similar infringement actions where the circumstances of the particular case warrant such an award. *See Broadcast Music, Inc. v. Behulak*, 651 F. Supp. 57, 62 (M.D. Fla. 1986) (attorneys' fees of $41,887.50 awarded after trial but specifically for time expended through the filing of the motion for summary judgment). The instant case, too, "cries out for an award of attorneys' fees." *Milene Music, Inc.*, 551 F. Supp. at 1298 (D.R.I. 1982). Defendants have not only continued to violate the Copyright Law but also cannot come forward with any justification for his actions or any "colorable grounds" for a defense. *Id.* at 1297. Therefore, the Court should award Plaintiffs their costs, including reasonable attorneys' fees.

Moreover, Defendant Richard DeBuhr's obstreperousness has unnecessarily prolonged this matter. Where a defendant's own actions have needlessly increased plaintiffs' fees, an award of attorneys' fees to the plaintiff is especially appropriate. *See Int'l Korwin Corp.*, 855 F.2d at 384. "Attorneys' fees [in copyright infringement cases] may be awarded for reasons other than simply making the plaintiff whole, such as encouraging the assertion of colorable copyright claims and deterring infringement." *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1230

(7th Cir. 1991). In *Chi-Boy*, the circuit court, in affirming the district court's award of $40,000 in statutory damages and $48,633.37 in attorneys' fees and costs noted the defendant's disdain for the copyright laws as a factor supporting the award of fees. *See also, Boz Scaggs Music*, 491 F. Supp. at 915 ("[T]he counsel fee provision was designed to penalize the losing party as (well as) to compensate the prevailing party.")

From the outset, Defendants has conducted this litigation in a uncooperative and combative manner. Such tactics are not without attendant costs. Plaintiffs respectfully ask the court to take note of the substantial time devoted to developing the account of this case, much of which resulted from Defendants' intransigence. Plaintiffs' counsel submits with this motion an affidavit setting forth attorneys' fees and other costs incurred to date in connection with this action. Affidavit of Kate O'Hara Gasper, **Exhibit 9**. Accordingly, Plaintiffs' application for attorneys' fees add costs in the amount of $31,945.38 is reasonable and should be granted in full.

CONCLUSION

Based upon the foregoing, Plaintiffs' motion for summary judgment against Defendants should be granted, and the Court should grant injunctive relief permanently enjoining and restraining Defendants from performing any and all copyrighted musical compositions in the ASCAP repertory, award statutory damages of $4,000 for each cause of action, award costs, including reasonable attorneys' fees, and for any such further relief as the Court deems just under the circumstances.

Respectfully submitted,

LATHROP & GAGE LLP

By: *_/s/ Kate O'Hara Gasper_*
Robert O. Lesley, MO 32458
Joan K. Archer, MO 44070
Kate O'Hara Gasper, MO 61198
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108
Phone: (816) 292-2000
Fax: (816) 292-2001
rlesley@lathropgage.com
jarcher@lathropgage.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was forwarded, via first class U.S. mail, postage prepaid, this 12th day of April, 2010, to the following counsel for the defendants, addressed as follows:

ROBERT E. SUNDELL
Northside Mall, 115 East Fourth Street
Maryville, Missouri 64468
(660) 582-6633; 582-7733 (FAX)
robertsundell@embarqmail.com
Attorney for Defendants

With a courtesy copy to:

Dan Smith
213 Main Street
Rockport, Missouri 64482

*_/s/ Kate O'Hara Gasper_*
Attorney for Plaintiff